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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-530

JOE KELLER,

Petitioner,

versus

DRAVO CORPORATION, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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IN THE
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JOE KELLER,

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versus

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---

Joe Keller respectfully petitions the court to review by certiorari the judgment of the United States Court of Appeals for the Fifth Circuit, dated April 28, 1971, and apparently entered the same date. Rehearing was denied June 29, 1971 and the mandate was issued August 19, 1971.

OPINIONS

District Court's Opinion: Appx. A, p. 1a. Unreported judgment dismissing the complaint against some defendants upon affidavits and against others upon pleadings alone.

Opinion of the Court of Appeals: Appx. B, p. 6a, 441 F.2d 1239 (1971) affirming as to some defendants and as to one defendant on one count remanding only.

JURISDICTION

Original jurisdiction, 28 U.S.C. Sec. 1331, Admiralty. 28 U.S.C. Sec. 1254 (1) invokes this Court's jurisdiction.

QUESTIONS

Constitutional

1.

The constitutionality, from the standpoint of equal protection and due process, of the Longshoremen and Harbor Workers Act's bestowing upon one class of workers injured on the job a cause of action against the tort-feasor while denying that right to another class of workers injured on the job. 33 U.S.C. Sec. 933 (i) on its face and in application here grants such right to that class of workers injured by tort-feasors not in the "same employe." It denies such right to the class of workers injured by tort-feasors in the same employ. In essence, it provides that suits may be brought for job-incurred injuries against tort-feasors so long as they are not in the same employ. The question is whether this denies equal protection and due process because one class of injured workers have greater protection against tort-feasors than the other for in-

sufficient reason. (The manager of a company could run over a worker in gross negligence; the latter would be entitled to limited compensation only though the manager's car be heavily insured. A visitor following right behind the manager could run over another worker and the latter would be entitled to both compensation and damages. Is this invidious class legislation?)

Insurance

2.

Whether this provision of class legislation, if valid, inures to the benefit of the personal insuror of individuals for their own torts.

Maritime: Vessel Status

3.

Whether, as a matter of law, a floating, navigable dry dock, which is frequently navigated, is a vessel while providing a place for ship repairs.

4.

Whether a vessel is out of navigation as a matter of law solely because she is out of operation on drydock for repair of fresh damage to bottom plates caused by a casualty occurring while she was admittedly under way in navigation, although the repairs

do not amount to "new construction" nor "complete conversion."

CONSTITUTIONAL PROVISIONS

14th Amendment:

> "... nor shall any state deprive any person of life, liberty or property without due process of law; or deny to any person within its jurisdiction the equal protection of the law ...."

5th Amendment:

> "No person shall ... be deprived of life, liberty or property, without due process of law ...." (Thus making the equal protection clause applicable to the federal government.)

STATUTES

Longshoreman and Harbor Worker's Act

33 U.S.C. Section 933 (i): "The right to compensations or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer." 73 Stat. 391.

Louisiana Direct Action Statute

22 La.R.S. 22:655: ". . . The injured person shall have a right of direct action against the insurer .... It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, ..." Acts, 1962, No. 471, Sec. 1.

THE CASES

Two cases are up on the pleadings alone; two, up on the pleadings supported by an affidavit, one of which is controverted.

THE CASE AGAINST OPERATING OFFICERS OF KELLER'S EMPLOYER

Keller's first suit is against certain individuals who were members of the management of his corporate employer, McDermott Incorporated. This case was met by a motion to dismiss in the nature of a confession and avoidance. The constitutionality of the avoidance was timely preserved by a motion to note constitutional issues. Appx. ~~C~~ B, p. ~~20a~~ 37. Defendants' motion confeses that Keller was hurt on a dry dock owned by his employer while working on navigable water. Among others, a proximate cause of Keller's injuries was negligence of several operating officers of the corporate employer. Negligence was gross if not willful.

These defendants' avoidance is that Keller has no cause of action against them because they are in the "same employ" as defined and applied by 33 U.S.C. 933 (i). This provides that Keller can sue tort feasors for job-incurred injuries but only so long as they are not McDermott officers or employees.

The Court of Appeals affirmed dismissal on the pleadings, based on this insulation from suit.

ARGUMENT ON CONSTITUTIONAL ISSUES

The exact question has never been decided by this court. But the holding below seems to conflict with principles of this court in other cases.

The constitutional issues are of major importance because they have a drastic effect on a great number of maritime wage earners throughout the nation while auto and liability insurors reap a windfall from tragedy. Property rights, however humble, are essential to a free people, and thus to a democratic society; and even-handedness in redress, a part of the constitutional pursuit of happiness.

The Harbor Workers' Act controls the liability of not only employers but also of their operating officers to all the maritime workers and their family throughout the nation for "job-incurred" injuries. Its $70 a week maximum payment is often a mere fraction of the injured worker's normal earnings. (It is deducted from any social security disability benefits, 424 U.S.C.A. Sec. 424a.) In a day of relentless inflation, credit buying

for the family, and college education for the children, the resulting economic stress often creates hardship, fear and worry similar to the cloud of indictment that hangs too long over the head of the accused. Death or permanent disability have catastrophic consequence on family finances despite the limited compensation payment. And the scope of "job-incurred" injuries is so broad that the immunity provision produces dismaying results to the economic benefit of liability and auto insurers. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), *O'Leary v. Brown-Pacific-Maxom, Inc.*, 340 U.S. 504 (1950).

On obvious reasons of principle and policy, rights of recovery of just compensation from maiming tortfeasors should not be treated lightly and treatment should be evenhanded as practical. The implied holding of the Court of Appeals that the lack of equal protection between the two classes of injured workers is justifiable appears to be in conflict with the decisions of this court concerning two classes of damaged children, only one of whom could sue under state law for the wrongful death of a parent. In *Levy v. Louisiana*, 391 U.S. 68, and *Glona v. American Guaranty and Liability Insurance Company*, 391 U.S. 73 (1968), that a class of damaged children bore an illegitimate relationship to their parents was not an adequate basis for denying them equal protection of a wrongful death statute which bestowed rights of recovery upon the class of damaged children who bore a legitimate relationship to their parents for their wrongful death. If the relationship of illegitimacy between parent and

child is not strong enough to warrant such invidious distinction, then we submit that there is grave constitutional doubt that the relationship engendered merely by being on the same payroll will stand the test.

The arguments in justification of distinguishing classes of damaged children — that the state has an interest in preventing a premium on perjury and its courts from becoming vehicles of fraud, particularly where a claim for the death of an illegitimate father is concerned — are more rational than any offered to support the two classes of injured breadwinners created by this immunity provision: Both are entitled to limited compensation regardless of fault on the part of anyone. But one is given the additional and privileged protection of the law when maimed by a tortfeasor who happens not to work for the same employer. That the immunity provision is reciprocal does not save it, for "Equal protection of the law is not achieved through indiscriminate imposition of inequalities." *Goesaert v. Cleary*, 335 U.S. 464 (1948).

The immunity provision is imposed on a worker; he does not ask for it merely because he asks for a job; if he does then the state has found a way to impose any condition upon its citizens merely because they must work for a living. *Green v. McElroy*, 360 U.S. 474 (1959). A similarly, but not identically, structured immunity provision was struck down by the Illinois Supreme Court as violative of the Federal and Illinois constitutions in *Grasse vs. Dealers Transport Com-*

pany, 411 Ill. 179, 106 N.E. 2d 124 (1952). It had been on the books thirty-five years and was nullified the first time attacked on the grounds of unequal protection. That court held that the immunity provision was not the *quid pro quo* for the imposition of liability without fault upon employer. "The alleged 'quid pro quo' for imposing liability without fault upon employers to their employees is the scheduled and limited payments the employers are required to pay their employes, not the additional bonus of limiting both the employer's and employee's common law liability to third persons."

The severability of the immunity provision in the Harbor Workers' Act is expressly provided for by 33 U.S.C. Sec. 950, "If any provision of this chapter is declared unconstitutional or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby."

Though Keller from the outset strongly objected to the very concrete and basic denial of equal protection, both courts either overlooked or silently ignored his plea. (The oversight was expressly brought to the Court of Appeals' attention in the petition for re-hearing.) So we have no way of passing on to this court the Court of Appeals' thinking on the matter. Its only reply was that since the Harbor Worker's Act was here before Keller he had no constitutional right in a cause of action not yet vested, which appears to wholly miss

the point since the Louisiana wrongful death act was here before the damaged children.[1]

THE CASE AGAINST THE OPERATING OFFICERS' PERSONAL INSUROR

Under Louisiana's Direct Action Statute, Travelers Insurance Company was joined as the personal insuror of the individual defendants upon the authority of the Court of Appeals, *Alcoa Steamship Company v. Charles Ferren & Company*, 383 F.2d 46 (5th Cir., 1967), which held that an insuror, under the Direct Action Statute, could not take advantage of "personal" defenses of the insured. A personal defense was defined as one common to each person of a class because "the law granted it to all members of this class as a matter of public policy." Under this definition, if the immunity or personal defense provided by the Harbor Workers' Act is valid, it is one of public policy which the insuror cannot partake of according to the Court of Appeals own decision in *Olympic Towing Company v. Nebel Towing Company*, 419 F.2d 230 (5th Cir., 1969) cert. denied, 90 S.Ct. 1120, which held that such personal defenses did not inure to the benefit of the insured. But without assignment of reason, nor even recognition of the issue, the Court of Appeals, simply affirmed dismissal of the personal insurer. Petition for rehearing brought no elaboration nor comment.

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[1]We deem it axiomatic and well settled that the equal protection clause applies to federal statutes through the due process clause of the 5th Amendment. *Curry v. McCanless*, 300 U.S. 357.

ARGUMENT

This silent ruling is an inconsistent departure now casting doubt upon the entire matter of the insurer's position which should be set straight and settled by this court. We believe this particularly true if the individual defendants used corporate funds and Travelers knowingly received them for premiums. Certainly with insurance already purchased, no harm is done to the structure of the Harbor Workers' Act while the policy of just compensation for torturous injury is maintained.

Bestowing such immunity upon the insurer of these individuals would appear to be virtually an impairment of contract since liability policies in Louisiana have been held public contracts wth the public a direct third-party beneficiary. (These individuals may have purchased this coverage with a question in mind concerning the validity of the immunity provisions of the Harbor Workers' Act since a similarly structured immunity provision had been struck down by the Illinois Supreme Court.)

THE CASE AGAINST KELLER'S EMPLOYER AS OWNER OF THE DRY-DOCK

Keller's case here is that he was hurt on a dry-dock owned by his employer because of its unseaworthiness while he was doing ship's work.

Taking his pleadings and affidavit (Appx. E, p. 23a) against summary judgment as true, the dry-dock was navigable; it was frequently towed about as standard

routine in its work. It was equipped with navigation aids, manned while under tow, and at the time of this accident, was temporarily moored serving as a place of repair. It had never been permanently fixed to the land. The purpose of mooring was simply to keep it from floating away. (In voyage, it navigated the Intracoastal Canal, a major highway of commerce.) On this, the Court of Appeals affirmed summary judgment against Keller on the sole ground that the dry-dock was not a vessel at the time of the injury because it was performing its "primary function."

ARGUMENT

The decision that, as a matter of law, a vessel is no vessel when it is stationed in its primary function presents a question of great importance to the maritime industry and those who labor in it for it would overturn the Jones Act and abolish the maritime remedies of unseaworthiness and maritime liens in countless cases involving many types of vessels which must be on station when performing their "primary function." The decision makes conflict with the congressional definition of "vessel":

> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. Sec. 3.

The decision conflicts with this court's in *Gianfala v. Texas Company*, 350 U.S. 879 (1955) reversing *Texas Company v. Gianfala*, 222 F.2d 382, (5th Cir., 1959).

There, the vessel was a submersible drilling barge in its primary function of drilling an oil well; at the time of the accident, it "was sunk to the bottom, with tons of water holding it fast to the bottom. Its spuds were in place and, around the drilling hole, piles had been driven and board planking nailed to the vertical pile to guide the *Shay* snugly to the well site and to assist in holding it in place." 222 F.2d 384, note 2. The Fifth Circuit took plaintiff's verdict from him, holding, among other things, that "When the accident, on which this suit is based, took place, the vessel was not in navigation." This court reinstated the verdict without comment, but with citation, and of necessity adjudicating that a vessel in navigation was involved although it was immobile and stationed for its primary purpose. This began a line of cases which culminated in the Fifth Circuit holding that such an "artificial contrivance used, or capable of being used, as a means of transportation on water" was a vessel in navigation as a matter of law. *Producers Drilling Company v. Gray*, 361 F.2d 432 (5th Cir., 1966), affirming a directed verdict on the point.

The appellate decision appears to rely ultimately upon misinterpretation of this court's decision of *Cope v. Vallett Dry-Dock Company*, 119 U.S. 625 (1887). In *Cope*, this court held that the dry-dock in question was not a vessel in navigation. Why? Becuase it had been a real fixture, a part of the land, permanently fixed to the land for some twenty-one years in a manner similar to a wharf or a pontoon bridge which has always been in law an extension of the land and a real fixture thereto. *Cope* went into a detailed factual ex-

planation of why the particular dry-dock was not a vessel. Irrelevancy is not to be imputed. If *Cope* was meant to be all-inclusive, the detail would have to be considered mere surplusage. (This court may take judicial knowledge that there are ocean-going dry-docks.) See *Bernardo v. Bethlehem Steel Company*, 314 F.2d 604 (2nd Cir., 1963): the status of a dry-dock was held to be in question of fact for the jury. Cases such as *The Ark*, 17 F.2d 446 (D.C., S.D. Fla., 1926) and *U.S. v. Morran Transportation Company*, 374 F.2d 656 (4th Cir., 1967) have long recognized, expressly or implied, the restrictive nature of the *Cope* decision. The key to *Cope* is that this court repeatedly emphasized that the dry-dock was permanently fixed and fastened to the land, even to the extent of its spars being buried deep within the earth for a score of years.

THE CASE AGAINST KELLER'S EMPLOYER AS OWNER OF THE VESSEL UNDERGOING REPAIRS ON THE DRY-DOCK

In the alternative, Keller counted that he was doing ship's work aboard the vessel undergoing repairs, entitling him to the warranty of seaworthiness and that his employer was the owner of the vessel, either pro hoc vice or otherwise.

In the pleadings and the supporting affidavits, McDermott admits all this except that it contends that the vessel while undergoing repairs was not a vessel, but a dead ship withdrawn from navigation solely because of the nature and extent of repairs.

The pleadings and affidavits both show and confess that this vessel, *Mixer Barge No. 4*, was coming down the bayou with its sleeves rolled up, on its way to work; ready, willing and able to work, and with a job to go to that it could then do. In voyage casualty, it stranded, either snagged or sliced bottom plates, settled with decks awash, was hurriedly pumped out, and rushed to McDermott's floating hospital, rushed through cure, and sent on its way to the job. It is also admitted that anything done on the dry-dock did not constitute "new or reconstruction", that is, building a new ship out of the salvage remains of an old; nor conversion, that is, killing a ship so that another may be born out of her parts; and that the standard test for new construction laid down by this court was not met. The trial and appellate courts nevertheless granted summary judgment, misimpressed and misled by an overemphasis on time and money needed for the repairs. (Seven days on dry dock; $37,193 total cost for all work on and off dry dock.)

ARGUMENT ON THE DEAD SHIP DEFENSE

The point is important because it often goes to the question of admiralty jurisdiction; cuts across the field of admiralty law, the Wreck Act, the Fire Act, the Limitations Act, the Lien Act, and the personal security of mariners provided by the warranty of seaworthiness and the Jones Act.

The decision conflicts with this court, with other courts, and with other decisions of the same court creating waywardness and confusion that should be

set right and settled. The dead ship doctrine is a serious defense that has never been taken lightly by this court, has always been strictly construed and limited, and has always required a heavy and certain proof by this court on the part of those who plead it.

The Jack-O-Lantern, 258 U.S. 96 (1921), is an acid test. The point of law was whether there was a maritime lien. This court had before it squarely whether extensive repairs, renovations, and even substantial conversion denied admiralty jurisdiction to preclude a maritime lien. Since the Lien Act applies only to vessels in navigation, the effect of nothing more than extensive work to a vessel was put squarely before this court. The defense was dead ship, "that the contract was not one for repairs or supplies but for original construction, and therefore non-maritime," or simply that one vessel had been taken out of navigation and its parts used to construct another. *In reversing* the holding that the vessel had been so taken out of navigation, this court unanimously held that admiralty jurisdiction applied and thus the maritime lien obtained. In so deciding, this court held that the Lien Act made no changes in general principles of the law of maritime liens and that all reasonable doubts should be resolved in favor of a living vessel, and thus, admiralty jurisdiction. This, despite uncontradicted findings with which this court took no exception that the *Jack-O-Lantern* underwent extensive conversion and renovation.

The Court of Appeals holding also makes virtually diametrical conflict with this court's decision of *North Pac. S.S. Company v. Hall Brothers*, 249 U.S. 119 (1918); the factual similarity is striking: The vessel

had wrecked or stranded, was submerged and in need of some bottom plates, ice flows had torn away part of her upper deck and she had a job waiting the moment she got out of libellant's dry-dock. An exception was taken to admiralty jurisdiction on the sole ground of the extensiveness of the work. If the vessel were out of navigation, the contract could not be maritime, and admiralty jurisdiction would not apply. Again, this court held squarely that admiralty jurisdication obtained. (The jurisdiction was *in personam* but it goes without saying that it could have been *in rem* to impose a lien had the vessel been found.)

The Court of Appeals decision makes conflict with that of the Third Circuit in *Hercules Company v. The Brigadier General Absolum*, 214 F.2d 66 (1954). In reversing a denial of a maritime lien based on the dead ship doctrine, the Third Circuit pointed out that "The District Court's processes of reasoning seems to have been that, if the structure were held to be a dead ship, there would be no maritime lien. Our view is that if the structure were a dead ship, there would be no admiralty jurisdiction, and for that reason, there could be no maritime lien." (214 F.2d 68, footnote 1.)

Work done to a vessel does not in and of itself take the vessel out of navigation or invoke the so-called dead ship doctrine unless the work is so extensive that it deliberately kills one vessel to bring to life another out of its remains. *Advance Welding Company v. Corra*, 299 F. Supp. 736 (D.C., W.D. La., 1969).

The irony is that seaboard industry uses one line of cases to protect its financial security through the

benefit of the maritime lien and purports to inconsistently use another to deny seaboard workers the protection of their personal security through the benefit of the warranty of seaworthiness though the same point is involved, whether a vessel is withdrawn from navigation solely because of work done to it, with no other factors considered.

CONCLUSION

The open constitutional question affects the livelihood of a substantial segment of the maritime industry; its resolution by the court below appears to be in conflict with constitutional principles of this court; at the expense of this segment, the insurance industry reaps a windfall; maritime principles have been misconstrued and misapplied to produce confusion and conflict that should be set straight to prevent a denial of simple fair play and even-handedness; to remedy this, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE ON COUNSEL AND SOLICITOR GENERAL

I, the undersigned member of the Bar of the Supreme Court of the United States, hereby certify that three copies of this petition for a writ of certiorari has been served upon opposing counsel John Torian. Esquire, 201 W. Main, Lafayette, Louisiana, and one copy upon the Solicitor General of the United States, Department of Justice, Washington, D.C., 20530, pursuant to Rule 33 of this Court, by depositing the same, properly addressed, in the United States Mail, postage prepaid, at Lafayette, Louisiana, this ____ day of October, 1971.

_____

William P. Rutledge

APPENDIX A

REASONS FOR JUDGMENT AND JUDGMENT

Joe Keller

versus

Dravo Corporation, Et Al.,

No. 14,440

The plaintiff herein, JOE KELLER, originally filed suit against Dravo Corporation alleging on August 19, 1968, that while employed by McDermott, he sustained an injury while working aboard a "Mixer Barge", which was then located in a floating dry dock at the McDermott yard in Amelia, Louisiana. Subsequent to the original complaint, plaintiff then amended to bring in additional parties.

The plaintiff brought suit against officers and employees of McDermott alleging their individual fault and negligence was the cause of his accident, the officers and employees being Roger W. Wilson, H. W. Bailey, Vial J. LeBlanc (erroneously called Robert LeBlanc), Alfred E. Honenke (erroneously called Allen Hankey) and John H. Richardson (erroneously called Jack Richardson).

The plaintiff further named as defendants, The Travelers Insurance Company and The Travelers Indemnity Company alleging that they had issued policies of insurance to J. Ray McDermott & Company,

Inc. and that Travelers failed to inspect and detect unsafe working conditions and procedures at McDermott and, therefore, they were entitled to an action against the Travelers Companies individually.

The plaintiff further named as a defendant, J. Ray McDermott & Company, Inc., alleging that the floating dry dock was a vessel or alternatively that McDermott had such an interest in the "Mixer Barge" that it owed the warranty of seaworthiness to the plaintiff. The plaintiff specifically alleged that he claimed no rights under the Jones Act as against J. Ray McDermott & Company, Inc.

Subsequent to the filing of this complaint, the individual defendants, The Travelers Insurance Company, The Travelers Indemnity Company, and J. Ray McDermott & Company, Inc. each moved for summary judgment. The individual defendants moved for summary judgment under the provisions of 33 U.S.C.A. 933 which clearly provides that an employee, when injured and subject to the Longshoremen's and Harbor Workers' Act shall have no action against an officer or employee of his employer.

The Travelers Insurance Company and The Travelers Indemnity Company based their motion for summary judgment on the grounds that first there would be no duty owed by them to the plaintiff in view of the fact that their policy of insurance were issued in favor of J. Ray McDermott & Company, Inc. as alleged in the complaint and further that the Travelers Insurance Company and The Travelers Indemnity

Company would have immunity under the provisions of the Longshoremen's and Harbor Workers' Act.

J. Ray McDermott & Company, Inc. based its motion for summary judgment on the grounds that the floating dry dock was not a vessel and cited in support of that the case of *Atkins v. Greenville Shipbuilding Corporation,* 411 F. 2d 279 (5th Cir., 1969) and a recent District Court case entitled *Odis Russel v. Greenville Shipbuilding Corporation,* (Northern District of Mississippi, Greenville Division, Number GC 6811-S).

McDermott further moved for summary judgment on the basis that even assuming, without admitting, that it did have an interest in the "Mixer Barge", that this vessel was out of navigation due to the major repairs being performed on it and accordingly the warranty of seaworthiness would not be owed to the claimant. Without the warranty of seaworthiness, the claimant would have no claim against his employer under the Longshoremen's and Harbor Workers' Act other than for the compensation provided therein. 33 U.S.C.A. 905.

In support of this particular motion for summary judgment, J. Ray McDermott & Company, Inc. filed an affidavit of the superintendent of the shipyard. In this affidavit, it was affirmatively set forth that the Mixer Barge was in dry dock at the time of the alleged accident and further substantial repairs were being made to the hull of the vessel. Further, in support of its motion for summary judgment, McDermott filed a detailed list of repair specifications as well as cost

figures. Further, the answers to interrogatories as filed by Dravo Corporation in this matter affirmatively showed that the "Mixer Barge" had been sunk, floated temporarily and brought to the McDermott yard for repairs. The plaintiff did not controvert any of the facts found in the record.

The plaintiff did file an affidavit which was considered by the Court concerning the Dry Dock, and further raised a constitutional question in regard to the Longshoremen's Act.

The Court, after considering arguments of counsel and numerous briefs that were filed, does hereby direct the Clerk to enter the following judgment as to motions then pending as follows:

The plaintiff's motion to file affidavit is granted.

The plaintiff's motion to note a constitutional issue is overruled.

IT IS ORDERED, ADJUDGED AND DECREED that Roger W. Wilson, H. W. Bailey, Vial J. LeBlanc (erroneously called Robert LeBlanc), Alfred E. Honenke (erroneously called Allen Hankey) and John H. Richardson (erroneously called Jack Richardson) and their alleged insurers, The Travelers Insurance Company and The Travelers Indemnity Company, are dismissed from these proceedings with prejudice to the plaintiff's claims and at plaintiff's costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Travelers Insurance Company and The Travelers Indemnity Company in their individual capacities are dismissed from these proceedings with prejudice to plaintiff's claims and at plaintiff's costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that J. Ray McDermott & Company, Inc. is dismissed from these proceedings with prejudice to the plaintiff's claims and at plaintiff's costs.

The Clerk is hereby ordered to enter judgment as to the individual defendants, The Travelers Insurance Company, The Travelers Indemnity Company and J. Ray McDermott & Company, Inc. pursuant to Rule 54(b) in view of the fact that there is no just reason for delay and the Court does hereby expressly direct the entry of the above judgments.

Signed at Lafayette, Louisiana, this 6th day of March, 1970.

R. J. Putnam
DISTRICT JUDGE

Filed
March 6, 1970

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30255

JOE KELLER,
Plaintiff-Appellant,

versus

DRAVO CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(April 28, 1971)

Before GODBOLD, CLARK and INGRAHAM, Circuit Judges.

CLARK, Circuit Judge: This appeal challenges summary judgments in favor of a shipyard, its employees and its insurance carriers on the complaint of an injured workman who has received all benefits to which he is currently entitled under the Longhsoremen's and Harbor Workers' Compensation Act, 33 U.S.

C.A. § 901 *et seq.* (1971).[1] Assigned as errors were the following actions of the lower court: Its refusal to declare the exclusive remedy proviso of the Compensation Act unconstitutional; the determination that the insurers may partake of this insulation from liability; the holding that the moored, floating dry dock which contained the vessel on which the injury occurred was not itself a vessel; and, the decision that no warranty of seaworthiness because it was not in navigation at the time of injury. We affirm on all but the issue of insurer liability. We expressly pretermit any holding on that issue and remand that part of the action with directions to require a fuller factual development.

The pleadings and affidavits reflect this factual background. On August 19, 1968, Plaintiff-appellant, Joe Keller, a machinist employed by the defendant J. Ray McDermott & Co., Inc. (McDermott) was injured while removing a motor from a vessel designated s MIXER BOAT NO. 4, owned by another defendant, Dravo Corporation (Dravo). At this time, the vessel was undergoing extensive repairs on a floating dry dock in McDermott's Amelia, Louisiana marine repair facility, having recently been raised from a watery berth at the bottom of a Louisiana bayou following its sinking. Keller began to receive the compensation benefits due under the provisions of the Longshore-

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[1]Although the judgment of the district court adjudicated fewer than all the claims as to all of the parties [Dravo remains a party defendant], we entertain the instant appeal in view of the trial court's express determination that there was no just reason for delay and the express direction for entry of judgment. Fed.R.Civ.P. 54(b).

men's and Harbor Worker's Compensation Act and subsequently instituted this action.

As originally filed, the complaint set out a cause of action solely against Dravo for its alleged negligence and the unseaworthiness of MIXER BOAT NO. 4. The original complaint was amended to include McDermott; McDermott's President, Vice President, Amelia General Manager, General Superintendent and Safety Man; and, The Travelers Insurance Company and The Travelers Indemnity Company (collectively, Travelers), the insurers of McDermott and the individual defendants. The amended complaint predicated the liability of McDermott upon allegations that the unseaworthiness of the floating dry dock was a proximate cause of Keller's injury and, additionally because McDermott then exercised complete control and possession of the unseaworthy MIXER BOAT NO. 4. Liability as to the individual McDermott employees was hinged upon numerous acts and neglects which, in essence, constituted negligent failure to require McDermott to provide Keller with a safe place to work. Finally, as to Travelers, it was asserted: that the insurance companies had represented to McDermott and its officers that Travelers would inspect for unsafe working conditions and procedures and warn McDermott thereof; that, with Travelers' knowledge, McDermott and the individual defendants relied upon such representation, yet Travelers negligently failed to make such inspections; and that this negligence on the part of Travelers proximately caused Keller's injuries.

Pursuant to Fed. R. Civ. P. 56, McDermott, McDermott's employees, and Travelers made motions for summary judgment which were granted. Summary judgment in favor of McDermott rested on two foundations. First, the floating dry dock was not a vessel; resultantly, no claim of unseaworthiness could arise. Second, MIXER BOAT NO. 4 could not be unseaworthy since it was a vessel out of navigation undergoing major repairs. The District Judge granted the motion of the employees of McDermott, on the ground that 33 U.S.C.A. § 933(i) provided that an injured employee subject to the Longshoremen's and Harbor Workers' Compensation Act shall have no right of action against an officer or employee of his employer. Travelers motion, which was based solely on the pleadings without affidavit or other factual fleshing, was granted for two reasons: first, Travelers owed no duty to Keller, since the insurance coverage was issued in favor of McDermott; and, second, the insurers, just as their insureds — both corporate or individual — would have immunity under the above provision of the Compensation Act.

I. THE CONSTITUTIONALITY OF 33 U.S.C.A. §933(i)

Keller contends that 33 U.S.C.A. § 933(i) will not pass constitutional muster since it makes management immune from damage suits for its maritime torts against repair yard workers. As ground for this contention, it is asserted that this prohibition is completely devoid of any rational basis and denies the injured employee a property right without due process of law in violation of the Fifth and Fourteenth Amendments.

More succinctly stated, no *quid pro quo* existed so as to make the compensation scheme constitutional. This section provides:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

We reject Keller's contention that he was unconstitutionally deprived of a property right — the right to sue his employer and fellow-servants. Many years ago, when called upon to consider whether the Federal Employer's Liability Act superseded certain common law rights, the Supreme Court declared:

> A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred that any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will ... of the legislature, unless prevented by constitutional limitations. Mondou v. New York, New Haven, & Hartford

Railroad Co., 223 U.S. 1, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912).

This principle was explicated by later cases. While conceding that one can have no vested interest in any rule of common law, these cases emphasized that a right created under such a rule which has been perfected could not be taken away without being violative of the Fifth and Fourteenth Amendments. *Coombes v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 (1932). On the other hand, one cannot be heard to question the sufficiency of due process if the rule of law, which merely held the potential to create a property right, was changed before any right vested. This latter situation is precisely what obtains in the instant case.

Keller's right to sue his employer, its officers and his fellow-employees had not accrued and become vested before it was abolished by the limitation of 933(i).

The abolition of non-vested rights is especially innocuous if, as here, one remedy is substituted for another. *New York Central Railroad Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917). The limitation contained in §933(i) is in no way violative of the Fifth and Fourteenth Amendments. Since the subsection granting immunity is constitutional, the trial judge was correct in granting a motion of summary judgment in favor of the individual McDermott employees.

II. THE CLAIM AGAINST THE INSURER

On the bare basis of two sentences in an amended complaint[2] which presently stand undenied and unamplified by affidavit, deposition or any other fact generating process, this court is pressed to rule upon a legal issue of broad policymaking significance to insurance funding and safety inspection procedures under the Longshoremen's and Harbor Workers' Compensation Act. So far as is disclosed by the research of the parties and the independent research of this court, the precise question in issue has never been determined.

Keller bases his claim principally upon the recent holding of this circuit in *Hill v. U.S.F.&G. Co.*, 428 F.2d 112 (1970). *Hill*, while helpful in analysis, is not controlling. It concerned suits by hotel guests against an insurer, based upon alleged negligent failure of the insurer to carry out representations to the hotel company that it would take certain safety measures for guest security. No exclusive remedy clause such as that embodied in § 933(i), was faced in that decision.

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[2] "In the alternative and as a separate cause of action, Travelers Insurance Company and Travelers Indemnity Company represented unto McDermott and the individual defendants that they would undertake to inspect the unsafe working conditions and procedures and warn McDermott thereof; McDermott and individual defendants relied upon said representation; the Travelers Companies knew or should have known of said reliance and yet negligently failed to inspect and detect the unsafe working conditions and procedures, rules, regulations and customs that were in force at the time of plaintiff's injury. "Travelers' negligence was a proximate cause of plaintiff's injuries."

The decisional law which has considered insurer liability for failure to make inspections in workmen's compensation act situations, has been widespread and has produced differing results. Although the majority of decisions have allowed the insurer to partake of the employer's immunity,[3] a significant number of cases have held that the insurer stood in no different position from any other negligent third party.[4] There is authority to suggest a basis for reconciling these different results, which would analyze the statute to find whether an insurer was expressly categorized as an employer who partook of that act's exclusive remedy protection. *See West v. Atlas Chemical Co.*, 264 F.Supp. 697 (E.D. Mo. 1966).

In the case at bar, we simply decline to resolve this problem on the basis of conclusory pleading allegations which may prove to be nothing more substantial than lawyer talk. For example, in *Evans v. Liberty*

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[3]Modjeski v. Atwell, Vogel & Sterling, Inc., 309 F.Supp. (D.Minn. 1969); Mustapha v. Liberty Mut. Ins. Co., 286 F.Supp. 890 (D.R.I.) *aff'd per curiam* 387 F.2d 631 (1st Cir. 1967); Hughes v. Maryland Cas. Co., 76 S.W.2d 1101 (Mo. App. 1934); Sarber v. Aetna, 23 F.2d 434 (9th Cir. 1928); Schultz v. Standard Acc. Ins. Co., 125 F.Supp. 411; Bartolotta v. Liberty Mut. Ins. Co., 411 F.2d 115 (2d Cir. 1969); Kotarski v. Aetna, 244 F.Supp. 547 (E.D. Mich.), *aff'd per curiam*, 372 F.2d 95 (6th Cir. 1967); Williams v. U.S.F. & G., 358 F.2d 799 (4th Cir. 1966); Horne v. Security Mut. Cas. Co., 265 F.Supp. 379 (E.D. Ark 1967); Donohue v. Maryland Cas. Co., 248 F.Supp. 588, *aff'd* 363 F.2d 442 (4th Cir., 1966).

[4]Nelson v. Union Wire Rope Corp., 311 Ill. 2d 69, 199 N.E.2d 769 (1964), *see also: Same Case*, 39 Ill. App.2d 73, 187 N.E.2d 425 (1963); Fabricius v. Montgomery Elevator Co., 254 Iowa 1319, 121 N.W.2d 361, 93 ALR2d 591 (1963); Mays v. Liberty Mut. Ins. Co., 323 F.2d 174 (3d Cir. 1963); Smith v. American Employers Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960).

Mutual Ins. Co., 398 F.2d 665 (3d Cir. 1968), a case cited by the insurers here, our sister circuit expressly declined to overrule *Mays v. Liberty Mutual Ins. Co.*, *supra n.* 4, because the facts developed in the *Evans* record clearly demonstrated that a cause of action did not exist.

Without intimating any views on what the facts may turn out to be and expressly pretermitting any resolution of the ultimate legal issue, we remand this cause to the district court with directions to require the plaintiff and the defendant insurance carriers to join issue on the facts so as to enable that court to determine: what representations, if any, Travelers made to McDermott or to its officials; what reliance, if any, McDermott or its officials placed upon such representations; what actions or omissions on the part of the employer resulted from such reliance; what actual or imputed knowledge Travelers had of such reliance by McDermott or its officials; and, what proximate cause relationship existed between any actions or inactions on the part of Travelers and the injury to the plaintiff.

If after a sufficient factual development the basis for a third-party action has been demonstrated to exist in the case at bar, so that the underlying legal issue is present and ripe for adjudication, the district court should then make that appropriate determination on the basis of a real case rather than deciding it as an abstract principle of law.

III. THE DRY DOCK — A VESSEL?

In support of its motion for summary judgment, McDermott produced the affidavit of its shipyard superin-

tendent to factually negate that portion of Keller's complaint grounded upon the assertion that the floating dry dock in which MIXER BOAT NO. 4 was undergoing repairs was a vessel which owed Keller a warranty of seaworthiness. Keller thereupon filed a counter-affidavit designed to refute the operative facts contained in McDermott's proof. Based upon these two affidavits, the district judge granted McDermott's motion for summary judgment on the grounds that, under the undisputed material facts, the dry dock in the instant case was, as a matter of law, not a vessel and therefore no warranty of seaworthiness arose.

The opposing affidavits do not deal with precisely the same points, and they differ about some points common to both. McDermott, pointing to the absence of motor power, asserts that the dry dock was neither designed nor used for navigation. Keller, on the other hand, deposed that the dry dock was equipped with various navigational aids and that it was frequently moved about. Nevertheless the two affidavits raise no dispute on what we regard as the material and critically dispositive facts. First, there is no dispute that at the time of the mishap the dock was engaged in its primary function as a dry dock. Moreover, there is no dispute on the issue that at the time of Keller's injury it was engaged in this function and that it was moored by chains and cables to McDermott's dock.

While we are unwilling to promulgate an absolute rule of law that a floating dry dock can never be a vessel, we are bound under the facts in the instant case by our decisions in *Chahoc v. Hunt Shipyard*, 431

F.2d 576 (5th Cir. 1970) and *Atkins v. Greenville Shipping Corp.*, 411 F.2d 279 (5th Cir. 1969). In these two cases this circuit clearly embraced the proposition that, as a matter of law, a floating dry dock is not a vessel *when it is moored and in use as a dry dock.* Since the undisputed material facts indicate that the instant dry dock occupied the above status at the time of Keller's injury, the grant of summary judgment by the trial judge was proper.

IV. THE MIXER BARGE — A VESSEL IN NAVIGATION?

Finally, Keller asserts various facts create a cause of action against McDermott for a breach of warranty that MIXER BOAT NO. 4 was seaworthy. Keller alleges that McDermott had a sufficient possessory interest in the vessel while it was aboard the dry dock to qualify McDermott as an owner, *pro hac vice.* Based upon the claim that the barge was a vessel in navigation, he asserts that a warranty of seaworthiness was owed to those working aboard it. Finally he concludes this warranty was breached with resultant harm to him while he was in the service of the vessel performing a seaman's work.

The district judge in granting summary judgment in favor of McDermott on the issue of the barge's seaworthiness, based his ruling on Dravo's answers to Keller's interrogatories and an affidavit of McDermott's shipyard superintendent. The answers to interrogatories indicated that the barge had been refloated and, with the aid of stripping pumps and a pumping

crew, towed to McDermott's repair yard to be put in a seaworthy condition once again. The documentation further indicated that when Keller was hurt the mixer barge was in dry dock undergoing substantial repairs to its hull. A section of the hull measuring 26 1/2 feet by 10 feet had to be removed to repair the damage done at the time of the sinking. During the repair period, the mixer barge could not have possibly been placed in the water without sinking. Keller placed no affidavits before the district court to refute the above facts.

Keller now asserts that this showing in support of McDermott's motion for summary judgment was insufficient to demonstrate that no genuine issue of material fact existed as to the withdrawal of MIXER BOAT NO. 4 from navigation, by presenting two issues.

First, does the language of Fed. R. Civ. P. 56(e) require the party who opposes the grant of summary judgment to affirmatively present proof of facts when a motion for summary judgment has been made and supported by proper documentation? Allegations in pleadings normally cannot create a fact issue which will defeat a motion for summary judgment supported by affidavits which negate those allegations. This is the clear intent of Rule 56(e) which provided in pertinent part that "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings . . . " This rule intends to permit affidavits to pierce the allegations in an op-

ponent's pleadings and to require him to come forward with counter-proof in order to show genuine issues of fact. This is the approach clearly adopted by this circuit. *Scarboro v. Universal C.I.T. Credit Corp.*, 364 F. 2d 10 (5*th* Cir. 1966). While it is true that an exception to this general rule is found where the evidentiary matter in support of the motion does not establish the absence of a genuine issue of fact, *see* Advisory Committee Note of 1963 to Subdivision (e) of Rule 56, this exception is not pertinent here.

This brings us to the second issue, which requires that we determine whether the facts contained within the documentation considered by the district court were sufficient to eliminate all genuine issues of fact as to the navigational status of the mixer barge. The uncontroverted material facts indicate that the mixer barge had sunk, been refloated and maintained afloat by pumps solely for the purpose of being taken to McDermott's dry dock, and was there undergoing substantial repairs essential to restore it to a seaworthy condition. Dravo, the ship owner, had relinquished control over the vessel and Keler's orders came from McDermott as the repair contractor. These facts furnish ample support for the conclusion of the trial judge that MIXER BOAT NO. 4 was a vessel out of navigation, hence no warranty of seaworthiness could exist. *Johnson v. Oil Transport Company, Inc.*, ____ F.2d ____ (5*th* Cir. 1971) [No. 28418, March 12, 1971].

V. CONCLUSION

The Summary Judgments entered March 6, 1970 in favor of McDermott, its individual officers and em-

ployees, are affirmed. The Summary Judgment of that date in favor of Travelers Insurance Company and Travelers Indemnity Company is vacated and this cause is remanded for further proceedings not inconsistent with Part II hereof. Three-fourths of the costs of this appeal are assessed against appellant and one-fourth thereof is assessed against appellees, Travelers Insurance Company and Travelers Indemnity Company.

AFFIRMED AND REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
Room 408 — 400 Royal St.
New Orleans, La. 70130

August 19, 1971

Mr. Alton L. Curtis, Clerk
U. S. District Court
P. O. Box 106
Shreveport, Louisiana 71161

Re: No. 30255 — Joe Keller vs. Dravo Corp., et al. D. C. No. CA 14,440

Dear Sir:

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above

cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.
(XX) Original record on appeal or review.
( ) Original exhibits.
( ) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) CLAUDETTE STAIGER
Deputy Clerk

APPENDIX D

(Title Omitted)

No. 14,440

MOTION TO NOTE CONSTITUTIONAL ISSUES

Plaintiff respectfully moves this Honorable Court to note of record the plaintiff's contention that the defendants' motion to dismiss the individual defendants and their insurer on the grounds that 33 U.S.C.A. 933 (1) insulates them from liability, is unconstitutional in that it violates the Fifth Amendment of the Constitution of the United States so far as it provides:

> "No person shall ... be deprived of life, liberty or property, without due process of law ...;"

and likewise the Fourteenth Amendment of the Constitution of the United States, made applicable to the government of the United States by said the Fifth Amendment, insofar as it provides

> "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...";

and that said constitutional issues are raised at the earliest practical opportunity.

DOMENGEAUX, WRIGHT &
BIENVENU
/s/ Wm. P. Rutledge
WILLIAM P. RUTLEDGE

Filed
January 6, 1970

APPENDIX E

BEFORE ME, the undersigned Notary, personally came and appeared JOE KELLER, who, first being duly sworn deposes and says that:

Appearer worked in the yard in question for a considerable period of time; that he has observed the movement of the dry docks involved in this case personally from time to time over a long period; that the dry docks at the McDermott facilities at Amelia, Louisiana moved about with considerable frequency; that routinely they are towed into midstream and shuffled about from one slip to the other; that these routine movements are made with McDermott personnel and equipment aboard; that these personnel at times are taken from the ranks of yard personnel and that these parties participate in the throwing of lines, operation of lights, winches, pumps and docking and undocking of the vessel; that at times they are made with other vessels aboard; that said dock is equipped with navigation lights, during movement, life rings or the like and could be used to move a raised vessel from one place to another; that this dry dock,

together with the others, are not moored in the same slip or berth for long periods of time, say, month or years, but are moved about with considerable regularity; that when they are moved about they navigate upon water, are towed out into midstream or channel and moved to wherever McDermott desires them to be berthed, that there are slips and berths that in no sense of the word is the dry dock involved in this case left in any one position so that it could be considered, so to speak, as a permanent fixture to the land or permanently fixed to the land.

/s/ Joe Keller

Sworn to and subscribed
Before me this 30th day of
December, 1969.

/s/ (Illegible)
Notary Public